Nos. 79-1429, 79-1583

MICHAEL RODAK

In the Supreme Court of the United States

OCTOBER TERM 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., et al.,
Petitioner,

No. 79-1429 v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,

No. 79-1583 v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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The American Farm Bureau Federation respectfully submits this brief *amicus curiae.* Pursuant to Supreme Court Rule 36, this brief is filed with the written consent of the parties, which consent has been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois with its principal office in Park Ridge, Illinois. Farm Bureau has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member state Farm Bureau organizations in all of the states (except Alaska) and in Puerto Rico, representing more than 3 million member families.

The interest of the American Farm Bureau in these consolidated cases is to represent and protect the economic interest of Farm Bureau members who produce cotton and who will be adversely impacted by the cotton dust standard promulgated by the Secretary of Labor and the Occupational Safety and Health Administration.

Although cotton production and harvesting are not directly regulated by the standard, the tremendous cost of compliance for the textile and non-textile cotton processing industries will necessarily be passed back to cotton farmers resulting in reduced revenue for raw cotton production.

In issuing the cotton dust standard, the Secretary failed to recognize the economic impact on cotton farmers. While Farm Bureau supports safety in the workplace, it submits that the costs of health and safety standards must be fully considered and bear a reasonable relationship to the intended benefits. Safety regulation which ignores such principle is unrealistic, economically damaging and will not serve the legitimate safety and health expectations of Farm Bureau members and others.

ARGUMENT

I.

IN PROMULGATING A SAFETY AND HEALTH STANDARD UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE SECRETARY OF LABOR MUST DETERMINE WHETHER THE STANDARD IS ECONOMICALLY FEASIBLE BY FINDING A REASONABLE RELATIONSHIP BETWEEN THE COSTS AND BENEFITS OF THE STANDARD.

In defending health and safety standards under the Occupational Safety and Health Act (OSHA), 29 U.S.C. 651 *et seq.*, the Secretary of Labor has been repeatedly faced with the issue of interpreting the language contained in Sections 6(b)(5) and 3(8) of the Act. 29 U.S.C. 655(b)(5) and 652(8).[1]

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[1] Section 6(b)(5) relates to standards dealing with toxic materials or harmful physical agents and provides as follows:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of

(footnote continued)

Under Section 6(b)(5) the Secretary must establish a standard ". . . which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity. . . ." In concert, Section 3(8) defines a safety and health standard as a standard requiring actions ". . . reasonably necessary or appropriate to provide safe or healthful employment. . . ."

It is generally established that the effect of both Sections is to require that a standard be economically as well as technologically feasible. *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F. 2d 467 (D.C. Cir. 1974); *AFL-CIO* v. *Brennan,* 530 F. 2d 109 (3rd Cir. 1975); *Turner Company* v. *Secretary of Labor,* 561 F. 2d 82 (7th Cir. 1977); and, *American Iron & Steel Institute* v. *OSHA,* 577 F. 2d 825 (3rd Cir. 1978), cert. dismissed ..... U.S. ....., 101 S. Ct. 38 (1980).

While the Secretary and the court below do not disagree that a Section 6(b)(5) standard must be "economically" feasible, both have erroneously concluded that the economic feasibility requirement of the law is fulfilled once the

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(footnote continued)

the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired." 29 U.S.C. 655(b)(5).

Section 3(8) defines the term "occupational safety and health standard" as follows:

"The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. 652(8).

Secretary concludes that such standard will not cause the economic ruin of the regulated industry.[2]

The adoption and continued application of such an "economic disaster" feasibility test will impose unjustified cost burdens on industry and agriculture and will serve only to thwart the legitimate health and safety goals which Congress intended by enactment of the Occupational Safety and Health Act.

Health and safety standards should not be founded on an idealistic and totally unrealistic view that human safety and health have no economic boundaries. Virtually every moment of human life involves some risk of danger and

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[2] In the opinion below, the circuit court stated:

"We are assisted here by this court's interpretation of the feasibility requirement in *Industrial Union Department, AFL-CIO* v. *Hodgson* [499 F. 2d 467, 477-78]. In that case, we concluded that the feasibility requirement reflects Congress' recognition that employees would not be protected if their employers were put out of business." [Footnote omitted].

* * *

"Here the agency expressed [sic] concluded 'that although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation.' [Footnote omitted].

Of course, the agency's underlying cost estimates are not free from imprecision. Nonetheless, on reviewing the record we believe that OSHA fairly considered all the economic data submitted before constructing its estimates. The agency responded to significant criticisms of the cost estimates it used, and explained the economic impact it projected for the textile industry. As a result, this court is satisfied that OSHA has substantial support in the record for its cost estimates and finding of economic feasibility for the textile industry." *AFL-CIO* v. *Marshall,* 617 F. 2d 636 at 655 and 662 (D.C. Cir. 1979).

a corresponding pattern of behavior which accepts or obviates such risks based on economic or other practical considerations.

The third Circuit Court of Appeals in *AFL-CIO* v. *Brennan*, 530 F.2d 109, at 121 (3rd Cir. 1975), clearly recognized that noble but unacceptable application of unlimited safety when it facetiously stated: "Undoubtedly the most certain way to eliminate industrial hazards is to eliminate industry."

However, to avoid the apparent absurdity expressed in the third circuit decision, the Secretary is only willing to go one step further by requiring that safety requirements do not result in the total displacement of an entire industry.

The erroneous nature of the Secretary's position is further demonstrated by the possibility that the Secretary would feel compelled to issue a single safety standard on the basis that it would not cause economic disaster, even though such standard may needlessly consume an industry's entire regulatory cost paying ability. All further safety and health regulation would be precluded regardless of need. Clearly Congress would not intend to allow the Occupational Safety and Health Administration to adopt such a narrow and irresponsible approach.

Before OSHA regulates it must find that the regulation is economically feasible under Section 6(b)(5) to the extent that there exists a reasonable relationship between the benefits and the costs of the regulation. The mere fact that industry or agriculture can "absorb" the cost of a regulation cannot, alone, serve as a sound basis of economic feasibility when there is no balancing of the costs with the benefits. This position of cost-benefit balancing has been specifically followed in *Turner Company* v. *Secre-*

tary of Labor, 561 F. 2d 82 at 85 (7th Cir. 1977), in *RMI Co.* v. *Secretary of Labor,* 594 F. 2d 566 (6th Cir. 1979),[3] and, in *American Petroleum Institute* v. *OSHA,* 581 F. 2d 493 (5th Cir. 1978), affirmed on other grounds, 444 U.S. 818, 40 CCH S. Ct. Bull. p. B4095: "Although the agency does not have to conduct an elaborate cost-benefit analysis . . . it does have to determine whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard. . . ." 581 F. 2d at 503.

Determination of a cost-benefit relationship as a prerequisite to issuing an OSHA standard is not a task which will unjustifiably burden the Secretary as intimated by the court below: "Especially where a policy aims to protect the health and lives of thousands of people, the difficulties in comparing widely dispersed benefits with more concentrated and calculable costs may overwhelm the advantages of such analysis." [Footnote omitted] *AFL-CIO* v. *Marshall,* 617 F. 2d 636 at 665 (D.C. Cir. 1979). As stated by the court in *American Petroleum Institute* v. *OSHA,* 581 F. 2d 493 at 502: "Although 29 U.S.C.A. 655(b)(5) requires the goal of attaining the highest degree of health and safety protection for the employee, it does not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost. To the contrary, that section requires standards to be feasible, and it contains a number of pragmatic limitations in the form of specific kinds of information OSHA must consider in enacting standards dealing with toxic materials. Those include 'the best available evidence,' 'research, demonstrations, experiments, and such other in-

[3] "But neither will controls necessarily be economically feasible merely because the employer can easily (or otherwise) afford them. In order to justify the expenditure, there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions." 594 F. 2d 566 at 573.

formation as may be appropriate,' 'the latest available scientific data in the field,' and 'experience gained under this and other health and safety laws.' "

Failure by the Secretary to make a determination that there is a reasonable relationship between the costs and benefits amounts to agency usurpation of Congressional authority in violation of the non-delegation doctrine. *A.L.A. Schechter Poultry Corporation* v. *United States,* 295 U.S. 495, 55 S. Ct. 837 (1935); *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 55 S. Ct. 241 (1935).

Without interpreting Sections 6(b)(5) and 3(8) of the OSHA to require a cost-benefit relationship, the Secretary will be making virtually unconstrained choices of important social policy over the future of entire industries and agriculture. "The Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is thus vested." *Panama Refining Co.,* 293 U.S. 388 at 421, 55 S. Ct. 241 at 248.

II.

THE SECRETARY FAILED TO CONSIDER THE COST OF THE COTTON DUST STANDARD TO COTTON FARMERS AND THEREBY DID NOT DETERMINE THE ECONOMIC FEASIBILITY OF THE STANDARD UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT.

Nowhere did the court below or the Secretary fairly consider the cost ramifications of the cotton dust standard to cotton farmers.

While American cotton farmers are not directly regulated by the cotton dust standard in controversy,[4] they will be adversely affected because of the economic cost

[4] See 29 CFR §1910.1043 (OSHA Cotton Dust Standard).

consequences of the standard to the textile and non-textile cotton processing industries.

Based on an estimated cost of over 2.6 billion dollars to industry as assessed by OSHA's contractor for the cotton dust economic feasibility study, it has been further estimated that American cotton farmers will incur an annual revenue loss of more than 100 million dollars at 1976 prices. Such a revenue loss will take the form of reduced raw cotton consumption by U.S. mills.[5]

The estimated 100 million dollar loss to farmers may already be evidenced. For four straight years immediately preceding publication of OSHA's proposed cotton dust standard, cotton had stabilized its share of the U.S. mill fiber consumption at about 29 percent.[6] But,

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[5] See National Cotton Council of America, Petition for a Writ of Certiorari filed with this Court, No. 79-1583 at pages 8 and 9.

[6] "The Economic Outlook For U.S. Cotton," Report of the National Cotton Council, January, 1980, Appendix, Table 26.

Table 26
TEN-YEAR U.S. TEXTILE MILL FIBER CONSUMPTION
(Million Bales & Percent)

Calendar	Total	Cotton		Man-Made*		Silk & Wool	
Year	Bales	Bales	%	Bales	%	Bales	%
1970	19.9	7.9	39.5	11.5	57.6	.6	4.7
1971	22.3	8.3	37.0	13.6	60.9	.5	3.8
1972	24.3	8.0	33.0	15.8	64.9	.5	4.2
1973	26.0	7.6	29.2	18.1	69.3	.4	4.3
1974	23.2	6.9	29.7	16.0	69.2	.2	3.7
1975	22.1	6.4	28.9	15.5	69.9	.3	2.2
1976	24.1	7.1	29.2	16.8	69.5	.3	4.1
1977	26.4	6.6	26.0	18.5	72.9	.3	2.7
1978	25.9	6.3	24.6	19.2	74.4	.3	3.1
1979	26.7	6.4	24.0	20.0	74.9	.3	1.1

Due to rounding, individual numbers may not add to totals shown.

* Includes acetate, staple and waste.

with publication of the proposed very severe standard, cotton's market share began to slip. In 1979, cotton's share of U.S. mill fiber consumption was 6.4 million bales. If cotton had retained its pre-dust-standard market share, 1979 consumption by U.S. mills would have been 7.5 million bales.[7]

As a class, cotton farmers are not "consumers" to whom industry can "pass through" the cost of regulation without substantial and lasting impact. Unlike consumers, farmers cannot easily and freely decide whether to accept or reject the added regulatory cost by making a simple decision while in the department store. Cotton is one of the most expensive crops to produce, costing an average of $267.39 per acre.[8] Pre-planting investment must be made in cotton picking and stripping machinery, fertilizer, lime, specialized pesticides, defoliants and other items. The purchase, lease and maintenance of land with suitable soil and drainage conditions is an even greater prerequisite for production.

U.S. farmers faced with a substantial investment in a cotton producing operation simply cannot readily absorb an *annual* 100 million dollar loss. A brief review of the economic ramifications of such a cost impact demonstrates the economic predicament of the cotton farmer.

Is it possible for cotton producers to pass forward the estimated 100 million dollar revenue loss to the purchasers of raw cotton and to cotton end product customers? The

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[7] *Id.*

[8] "Cost of Producing Selected Crops in the U.S.," Report of Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, March 31, 1978, page 12.

success of such a strategy is limited by a number of factors. First, the purchasers of domestic raw cotton and finished cotton products are already faced with a heavy share of an estimated 2.6 billion dollar regulatory cost. Second, further increase in the cost of raw cotton and finished products which would result from a pass forward will assuredly contribute to the increased purchase of more competitively priced cotton imports by U.S. consumers and the utilization of man-made fiber substitutes by U.S. mills.[9]

In spite of the decision in *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F. 2d 467 (D.C. Cir. 1974), upon which the court below placed great emphasis for an understanding of the OSHA economic feasibility requirement *for industry,* no consideration has been given to the impact from foreign competition and reliance on substitute fiber on cotton farmers: "Similarly, if the competitive structure or posture of the industry would be otherwise adversely affected—perhaps rendered unable to compete with imports or with substitute products—the Secretary could properly consider that factor. These tentative examples are offered not to illustrate concrete instances of economic unfeasibility but rather to suggest the complex elements that may be relevant to such a determination [Footnotes omitted]." 499 F. 2d at 478.

Can cotton producers reduce or cease cotton production altogether and grow alternative crops which hopefully would allow a more profitable return than cotton? Some producers may find such a total transition an impossibility

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[9] U.S. per capita consumption of cotton for the period 1966-1977 dropped from 25.4 to 16.1 pounds.

Cotton and Wool Situation, ESCS, U.S. Department of Agriculture, May, 1978. Table 23—U.S. consumption of fibers: Total and per capita, page 36.

in view of a combination of factors including soil and climate conditions, technological inability and financial inability to reinvest in the necessary machinery. Furthermore, while many of the potential alternative crops, particularly grain crops, may appear economically desirable to the individual farmer, the aggregate economic effect of hundreds or thousands of cotton farmers[10] shifting their acreage to soybeans, sorghum, wheat or some other grain crop could be substantially harmful. Price levels in given markets would undoubtedly drop, thereby imposing undue hardship on newcomers as well as on producers who have traditionally grown a crop in reliance on normal market performance.

A final question is whether cotton growers who cannot diversify into substitute crops would liquidate farming operations and seek other employment? Liquidation may take the form of selling property to another larger producer or selling property for dedication to non-farm use. Either course of action has both economic and social cost implications.

To the extent that farming operations are consolidated to form larger corporate farms, U.S. food and fiber production will tend to become more centralized and ultimately less competitive to the disadvantage of buyers and processors of agricultural raw products and consumers. On the other hand, farm land may be permanently taken out of production thereby further contributing to the current

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[10] As of 1974, approximately 89,536 individual farms produced 12,223,500 acres of cotton. U.S. Department of Commerce, Bureau of the Census, Census of Agriculture, 1974, Vol. II, Part 6 (Crops, Nursery and Greenhouse products), page 28.

trend in loss of U.S. cropland and the corresponding reduced potential for future production.[11]

Whether farmland is irretrievably lost or production is further centralized, there will occur an erosion of the existing form of American agriculture which has proven to be socially and economically desirable.

Without consideration of the foregoing potential economic effects of the dust standard on agriculture, the Secretary cannot make the required finding of economic feasibility.

SUMMARY OF ARGUMENT

Sections 6(b)(5) and 3(8) of the OSH Act require that the Secretary initially determine the "economic feasibility" of a standard regulating toxic materials and harmful physical agents. In establishing the economic feasibility of a standard, the Secretary must find that a reasonable relationship exists between the costs and benefits of the

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[11] According to a 1977 study by the Soil Conservation Service, U.S. Department of Agriculture, U.S. cropland declined from 431 million to 400 million acres between 1967 and 1975. The decline occurred in eight of the ten production regions, including major cotton producing areas—the southeast, the southern plains and California. The same study indicates that of nearly 1 billion acres of *noncropland* in the United States, only 111 million acres have potential for conversion to cropland. Of 111 million acres, 43.4 million will encounter one or more conversion problems. Potential Cropland Study, SCS, U.S. Department of Agriculture, Statistical Bulletin No. 578, pages 4 and 5.

Conversion of agricultural land, in the long run, will limit the food and fiber producing capability of the United States. Greater reliance or marginally productive land will be necessary. Such reliance will require increased technology, including greater use of fuel. fertilizers and presticides, if productive output is to keep pace with the growing U.S. and world populations.

standard. Without such a finding based on substantial evidence, promulgation of health standards will be conducted irresponsibly without regard to the ability of the regulated sector to pay for the present standard and possibly future standards which are more beneficial.

If the Secretary persists in issuing regulations "at will," using only an "economic disaster" test for determination of feasibility, he will effectually be exercising his authority to make important choices of social policy in violation of the non-delegation doctrine.

The economic feasibility requirement of the Occupational Safety and Health Act clearly requires the Secretary to correct his total failure to assess the potential economic impact of the cotton dust standard on cotton farmers.

CONCLUSION

For the reasons stated, the judgment below should be vacated and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Amicus Curiae Brief of American Farm Bureau Federation In Support of Petitioners in American Textile Manufacturers Institute, Inc., *et al.*, v. Ray Marshall, No. 79-1429 and in National Cotton Council of America v. Ray Marshall, No. 79-1583 were served on

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this 19th day of November 1980, by first class mail postage prepaid, thereby serving all the parties required to be served in the above consolidated cases.

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